

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CODY PEPPER, et al.,

Plaintiffs,

-against-

FLUENT, INC., et al.,

Defendants.

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 11/22/2023

21-CV-6581 (JGK) (BCM)

ORDER

BARBARA MOSES, United States Magistrate Judge.

For the reasons stated on the record during the conference held on November 17, 2023, plaintiff's letter-motion dated October 27, 2023 (Pl. Ltr.) (Dkt. 87), seeking to compel defendants to produce additional documents and information in response to plaintiffs' written discovery requests (*see* Dkt. 94 Exs. A-B), is GRANTED IN PART, as follows.

It is hereby ORDERED that, with respect to each of the numbered categories of discovery set forth in plaintiffs' letter-motion, defendants shall, no later than **December 15, 2023**, produce the following documents and information:

1. **Identifying defendants' publishers.** Defendants shall provide the name, contact information, and ID number (or produce documents sufficient to show the names, contact information, and ID numbers) of the "last-hop" publishers that brought plaintiffs to one of defendants' websites in connection with each of the text messages sent to plaintiffs, and shall produce defendants' contracts with these publishers. If defendants cannot do so, they shall, instead, provide the names, contact information, and ID numbers of all publishers who drove traffic to the relevant websites on the days when were brought to those websites, and produce their contracts with all such publishers. To the extent possible, defendants shall narrow their response to the specific times that plaintiffs received the messages.

2. **Identifying Fluent employees who approve publishers and transactions.**

Defendants shall identify all members of Fluent's Compliance Team during calendar years 2019 and/or 2020, including their positions or titles. To the extent these individuals are no longer employed by defendants, defendants shall also provide their last known contact information and dates of employment with defendants.

3. **Plaintiffs' information and activity.** Defendants shall produce any remaining documents responsive to Requests for Production (RFPs) 2-4. To the extent defendants have already produced all responsive documents in their possession, custody, and control, they shall serve an amended response so stating in accordance with Fed. R. Civ. P. 34(b)(2).

6. **Defendants' oversight, handling of complaints, knowledge, approval, and intent.** Defendants shall produce, for attorneys' eyes only, all non-privileged documents reflecting complaints made during the four-year period preceding the filing of this action by or on behalf of consumers concerning unwanted text messages that directly or indirectly drove traffic to defendants' websites, as well as follow-up correspondence between the complainants and defendants (or between defendants and the relevant publishers) and documents reflecting resulting settlements, whether formal or informal. Documents withheld on privilege grounds must be logged. *See* Local Civ. R. 26.2.

7. **Documents relating to government investigations.** Defendants shall produce all documents previously provided to the Federal Trade Commission in connection with No. 9:23-cv-81045 (S.D. Fl.), or to the New York Attorney General in

connection with No. 21-027, that concern the issue of consumers being improperly driven to defendants' websites, either directly or indirectly, by unwanted text messages.

8. **Internal communications and business strategy documents.** Defendants shall produce all documents relied on or supporting the following statement in defendants' 2020 Form 10-K: "In addition, as we expand our usage of text messaging and push notifications to contact users, we become more dependent on third-party publishers that control the dissemination and deliverability of such communications." (*See* RFP 23, Dkt. 94-1 at 7-8.)

All relief not specifically granted herein is DENIED.

It is further ORDERED that, no later than **December 1, 2023**, the parties shall jointly propose a pretrial schedule for all remaining fact discovery and expert discovery, as well as a briefing schedule for any class certification motion.

The Clerk of Court is respectfully directed to close the motion at Dkt. 87.

Dated: New York, New York
November 22, 2023

SO ORDERED.



BARBARA MOSES
United States Magistrate Judge